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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

OMAR SPAHI,

Plaintiff and Appellant,

v.

NCB, FSB et al.,

Defendants and Respondents.

B251977

(Los Angeles County
Super. Ct. No. BC448648)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rita J. Miller, Judge. Affirmed.

Nass Law Firm and Edmond Nassirzadeh for Plaintiff and Appellant.

Law Offices of Robert E. Weiss, Inc., Cris A. Klingerman and John A. Perry for Defendants and Respondents.

* * * * *

By way of this lawsuit, appellant Omar Spahi seeks relief from a foreclosure sale of a luxury unit in a stock cooperative building in Santa Monica, California that Spahi inherited from his grandmother. The trial court granted nonsuit because it rejected Spahi's argument that a transfer of ownership from a relative of Spahi's grandmother to Spahi's grandmother extinguished the relative's deed of trust in favor of NCB, FSB (NCB). NCB and its trustee Robert E. Weiss, Inc. (Weiss), are respondents.

An interest in a stock cooperative building is an interest in real property. (Civ. Code, § 783.1.) “Real property is transferable even though the title is subject to a mortgage or deed of trust, but the transfer will not eliminate the existence of that encumbrance. Thus, the grantee takes title to the property subject to all deeds of trust and other encumbrances, whether or not the deed so provides. This means that the property may be sold on foreclosure of that deed of trust if the debt is not paid, even though the property is no longer owned by the original debtor.” (*Nguyen v. Calhoun* (2003) 105 Cal.App.4th 428, 438-439.) If the debtor is in default the lender may foreclose on its security. (*Id.* at p. 440.)

On appeal, Spahi purports to raise triable issues of fact, but none of his “facts” undermine the conclusion that the transfer of title to his grandmother did not extinguish NCB's security in the property. Spahi identifies no evidence or legal authority supporting his conclusion that NCB's interest was extinguished prior to the foreclosure sale.

The trial court also found no evidence supported Spahi's arguments that respondents technically violated statutes requiring posting notice of a pending foreclosure sale. On appeal, Spahi identifies evidence that NCB did not post the notice of sale as required but fails to show any prejudice. It was undisputed that Spahi knew of the impending sale. We affirm the judgment.

FACTS AND PROCEDURE

This appeal concerns unit 1809-P in a stock cooperative building located at 201 Ocean Avenue in Santa Monica, California. In 2006, Abdel-Hakim Ascar held the leasehold interest in the property and a stock certificate in the unit issued by Ocean Towers Housing Corporation (Ocean Towers), which owned the building. Both the stock certificate

and leasehold were necessary for ownership of unit 1809-P.¹ On June 23, 2006, Ascar executed a deed of trust in favor of NCB, which was recorded. In an agreement with NCB, Ascar promised not to transfer his interest in unit 1809-P without written consent of NCB.

On August 2, 2006, Ascar assigned his interest in unit 1809-P to Fadila Spahi (Omar Spahi's grandmother) as trustee of the Occidental Trust, without the written consent of NCB.² This was a "family transaction" as Fadila had loaned over \$500,000 to Ascar, and took his interest in unit 1809-P to secure that loan. According to Omar's counsel, "[i]t was a family transaction, so there was no recordation of that transaction." Omar states that "NCB . . . consented to the transfer of the unit away from the borrower [Ascar]," but that statement is not supported by any citation to the record or any evidence in the record. Fadila recorded the assignment of the leasehold interest.

Ocean Towers consented to the transfer from Ascar to Fadila. Ocean Towers issued a new stock certificate, and the one issued to Ascar was no longer the "official stock certificate for the unit."

Fadila continued to pay the debt Ascar owed NCB. NCB accepted those payments. Fadila died on December 22, 2007. Omar inherited his grandmother's interest in the unit. Omar initially paid Ascar's debt to NCB.

In 2008, Omar wrote NCB, stating that he was Fadila's grandson and the owner of unit 1809-P. NCB did not respond. At some point, Omar stopped paying NCB on Ascar's loan because he did not "have sufficient cash flow to service the debt." On June 25, 2009, NCB recorded a notice of default and on October 23, 2009, NCB recorded a notice of

¹ A stock cooperative is "a development in which a corporation is formed or availed of, primarily for the purpose of holding title to . . . improved real property, and all or substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation." (Civ. Code, § 4190, subd. (a).) Ownership in a stock cooperative is based on ownership of stock in the entity holding the title to the building and a lease of the individual owner's residence or apartment. (*Adler v. Elphick* (1986) 184 Cal.App.3d 642, 647.)

² Ascar is Fadila's niece's ex-husband. We now refer to Omar and Fadila by their first names because they share a surname. We intend no disrespect.

trustee's sale. NCB served Fadila with the notice of default in addition to Ascar. NCB did not serve Omar with notice. At that point, Omar had not recorded his interest in unit 1809-P, which he recorded about five months after the notice of default had been recorded.

Omar filed for bankruptcy on December 4, 2009, after NCB recorded a notice of default and notice of trustee's sale. Omar filed for bankruptcy "because he couldn't get anyone's attention at NCB. And so he needed relief from the court."

On October 14, 2010, NCB sold unit 1809-P in a foreclosure sale. Omar then filed the current lawsuit. During the pendency of this lawsuit, the overseer of elections at Ocean Towers concluded that Omar was the owner of unit 1809-P and awarded him voting rights.

As described below in more detail, Omar's operative pleading is his second amended complaint. There was a court trial, and following opening statements the court granted nonsuit.

1. Second Amended Complaint

In his second amended complaint, Omar asserted causes of action for wrongful foreclosure, violation of statutory duties, quiet title, and unfair business practices.

A. Wrongful Foreclosure and Violation of Statutory Duties

Both the wrongful foreclosure and the violation of statutory duties causes of action were based on the allegations that NCB and Weiss failed to record a notice of default and post the notice on the property as required by Civil Code section 2924, subdivisions (b) and (f). The trial court concluded that Omar was not entitled to statutory mailings under Civil Code section 2924b and failed to provide evidence to support his claim that notice was not posted pursuant to section 2924f. (On appeal, Omar argues there was evidence he would have testified respondents' failed to post notice.)

B. Quiet Title

In his action for quiet title, Omar alleged that "[o]n numerous occasions during the first quarter of 2010, Plaintiff and his father John Spahi contacted Defendant NCB and sought to make a tender of the amount necessary to reinstate the mortgage loan on the Subject Property, and stood ready to do so. Not only did NCB refuse the tender, in violation of Civil Code section 2924c(c) and (d) but NCB even refused the request for reinstatement

figures.” (On appeal, Omar identifies no evidence which supports this cause of action. Nor does he argue that any evidence exists which he was prevented from introducing.)

C. Unfair Business Practice

With respect to his claim for an unfair business practice under Business and Professions Code section 17200, Omar alleged “Plaintiff received an offer to purchase the Subject Property for the price of \$2.2 million from an individual named Arnold Abramowicz. . . . Dale Pearson, acting as the agent of and on behalf of Defendants, interfered with a contract to sell the Subject Property by telling the contracted buyer Mr. Abramowicz not to purchase the Subject Property at the time because he would be able to purchase the Subject Property for much less money later after Defendant NCB foreclosed on the Subject Property” The potential buyer canceled his contract. (On appeal, Omar offers no evidence in support of this claim. Nor does he argue any evidence exists which he was prevented from introducing.)

2. Trial

The court initially determined the quiet title cause of action should be tried first to the court. The court later concluded that it should determine all of the issues related to whether the foreclosure was wrongful. The court gave Omar’s counsel an opportunity to brief the issue. Counsel did not brief the issue. The court concluded briefing was not essential because there may not be additional issues after the court tried all equitable issues.

Just before trial, the court indicated it would try the quiet title cause of action and the Business and Professions Code section 17200 claim. Omar’s counsel essentially agreed, stating that Omar’s claim for damages arose only out of the wrongful foreclosure cause of action. The court further concluded “[i]f the causes of action for wrongful foreclosure and violation of statutory duties are necessarily decided by the court in its rulings on the quiet title and 17200 claims, there will be no need for a jury trial on those causes of action.”

During his opening statement at trial, Omar’s counsel argued that once Ascar assigned the lease to Fadila and a new stock certificate issued, NCB no longer had a security interest in the unit. Counsel concluded that NCB did not “have a security interest any more upon which to foreclose because that was lost.” According to counsel, because NCB

foreclosed on the wrong stock certificate, the foreclosure was a legal nullity. He argued the collateral “had been extinguished in 2006.”

Counsel for respondents argued that Omar did not raise that claim in his complaint. Counsel also argued that NCB’s security interest was not extinguished because the security interest existed since the loan originated and no one could extinguish it independent of the lender.

Following opening statements, the trial court conducted research and then encouraged defense counsel to move for nonsuit. The court was concerned that a borrower could not unilaterally alter his or her obligation to a lender. The court noted that Fadila recognized the obligation to NCB because she continued regular payments to NCB. The court indicated it found no notice violation because NCB gave Fadila notice, and at that time, Omar had not recorded his quitclaim deed. The court indicated it was concerned the transfer between Ascar and Fadila was void. Piggybacking on the court’s concern over Omar’s theories, defense counsel indicated a desire to move for nonsuit and the court deemed the motion to be made. The court then gave Omar’s counsel an opportunity to respond.

After a recess, Omar’s counsel thanked the court for the “opportunity to make a rebuttal statement in opposition to the . . . motion for nonsuit.” After giving Omar’s counsel an opportunity to identify evidence and present argument, the trial court granted nonsuit. This appeal followed.

DISCUSSION

On appeal, Omar makes the following three arguments: (1) nonsuit was improper because defendants never moved for nonsuit, (2) Omar’s counsel argued only with respect to the quiet title cause of action, and the court therefore erred in granting nonsuit as to all causes of action; (3) the court did not properly view the facts in Omar’s favor but instead drew inferences in favor of the defense. We discuss his arguments seriatim.

The standard for granting nonsuit and reviewing the grant of nonsuit are well established. “A defendant is entitled to a nonsuit if the trial court determines that, as a matter of law, the evidence presented by plaintiff is insufficient to permit a jury to find in

his favor. [Citation.] ‘In determining whether plaintiff’s evidence is sufficient, the court may not weigh the evidence or consider the credibility of witnesses. Instead, the evidence most favorable to plaintiff must be accepted as true and conflicting evidence must be disregarded.’” (*Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.) “‘The court must give “to the plaintiff[’s] evidence all the value to which it is legally entitled, . . . indulging every legitimate inference which may be drawn from the evidence in plaintiff[’s] favor.’”” (*Ibid.*) The reviewing court “will not sustain the judgment ““unless interpreting the evidence most favorably to plaintiff’s case and most strongly against the defendant and resolving all presumptions, inferences and doubts in favor of the plaintiff a judgment for the defendant is required as a matter of law.””” (*Ibid.*)

“‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.’” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) “‘This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.’” (*Ibid.*)

1. Respondents Moved for Nonsuit

Code of Civil Procedure section 581c, subdivision (a), which governs the entry of a nonsuit, provides: “Only after, and not before, the plaintiff has completed his or her opening statement, or after the presentation of his or her evidence in a trial by jury, the defendant, without waiving his or her right to offer evidence in the event the motion is not granted, may move for a judgment of nonsuit.”

Omar’s argument that respondents never moved for nonsuit lacks merit. Although the trial court suggested the motion, defense counsel indicated that the defense sought to move for nonsuit, and the court deemed the motion to be made. Omar’s counsel recognized that a motion for nonsuit had been made when he thanked the court for the opportunity “to make a rebuttal statement in opposition to . . . what’s pending now the motion for nonsuit.” Omar’s counsel was aware of the specific grounds as the court explained in detail why it thought that Omar could not demonstrate legal error. Omar’s counsel had an opportunity to respond to these grounds and argued at length.

Assuming a technical violation of Code of Civil Procedure section 581c, Omar does not show reversal is warranted. The error is reversible only if Omar can show that he would have avoided nonsuit had the court followed the correct procedure. (*Ritschel v. City of Fountain Valley* (2006) 137 Cal.App.4th 107, 114.) Here the court heard Omar's counsel's opening statement and allowed counsel an opportunity to respond to all of the court's tentative findings. Omar does not suggest he lacked notice of the grounds for the nonsuit but complains only that the court, not respondents, enumerated the grounds. He did not suffer any prejudice from this procedure.

2. The Court Indicated It May Try All Causes of Action

Omar argues his opening statement concerned only the quiet title cause of action. He therefore claims the court should not have granted nonsuit as to the other causes of action. In advancing this argument, Omar fails to consider the entire record. Although initially the court indicated it would consider only the quiet title cause of action, the court later concluded that the causes of action were interrelated and the court may decide all of them.

Omar's reliance on *Weyburn v. California Kamloops, Inc.* (1962) 200 Cal.App.2d 239, 241, is misplaced. He correctly points out that *Weyborn* stands for the proposition that a motion for nonsuit should not be granted following an opening argument when counsel's opening statement did not cover all facts he was expected to prove. (*Ibid.*) But the principle does not apply here because Omar identifies no "facts" he expected to prove that were not contained in his opening statement. There is no indication that Omar's counsel misunderstood the scope of the court's nonsuit. Omar cites nothing in the record supporting the inference that his counsel did not state all the facts he intended to prove during his opening statement and opportunity to oppose the motion for nonsuit.

3. Interpretation of Facts

Omar argues that the court did not interpret the facts in the light most favorable to him. He emphasizes the following facts: A stock certificate and leasehold both were necessary for ownership of unit 1809-P. In 2008, Omar sent a letter to NCB, which stated that he was the "sole owner" of the unit and his ownership was confirmed by NCB's vice president during the bankruptcy proceedings. The president of Ocean Towers would have

testified that its practice was to require consent of the lender to allow an assignment. NCB did not ask Ocean Towers to reissue the stock certificate to it which led Ocean Towers to believe NCB consented to the assignment from Ascar to Fadila. Ocean Towers recognized Omar as the owner of the unit. Omar would testify that NCB failed to properly post a foreclosure notice. Many of these “facts” are not contained in our record, but for purposes of this appeal we assume all of these facts to be true. (In contrast, we do not accept the unsupported legal conclusions Omar draws from these facts to be true.)

Omar fails to show how these emphasized “facts” undermine the trial court’s conclusion that Ascar could not unilaterally extinguish his debt by transferring his interest in unit 1809-P to Fadila. Even if Ocean Towers recognized Omar as the owner, that “fact” does not show NCB’s security interest was eliminated. As previously explained, a transfer of property subject to a mortgage does not eliminate the encumbrance. (*Nguyen v. Calhoun, supra*, 105 Cal.App.4th at pp. 438-439.) Similarly, Omar fails to show that his 2008 letter informing NCB that he was the owner of unit 1809-P terminated NCB’s recorded security interest. Both Fadila and Omar continued paying the money owed to NCB until Omar no longer could afford it. Nor does Omar attempt to show how the testimony regarding Ocean Towers recognition of him as the owner and issuance of a new stock certificate extinguished NCB’s recorded security interest. The fact that representatives of the stock cooperative believed that NCB had consented neither shows the necessary written consent, a waiver of that condition, or an agreement to extinguish the debt.³ To the extent Omar is attempting to argue the issuance of a new stock certificate extinguished NCB’s security interest, he cites no authority to support that argument and the argument is not persuasive. (*United Orient Bank v. Green* (S.D.N.Y. 1997) 215 B.R. 916, 924 [security interest survived issuance of new stock certificate].) In short, Omar fails to show *any* evidence supporting his conclusion that NCB’s security interest had been extinguished at the time it foreclosed.

³ A stock cooperative can impose restrictions on the transfer of the stock shares and prohibit assignment without authorization from the corporation. (9 Miller & Star, Cal. Real Estate (3d ed. 2015) § 25B:9, p. 25B-33 (rev. 2/2015).)

Finally, Omar also argues that he would have testified that respondents failed to properly post a foreclosure notice under Civil Code section 2924f. Civil Code section 2924f, subdivision (b)(3) requires that the notice of sale be posted in a conspicuous place on the property at least 20 days before the date of the sale. Assuming respondents failed to properly post the notice, Omar does not dispute that he received actual notice when he filed for bankruptcy. Omar does not allege or argue that he failed to receive notice. He fails to show that he suffered any prejudice. (*Ram v. OneWest Bank, FSB* (2015) 234 Cal.App.4th 1, 11 [prejudice is not presumed from an irregularity in the foreclosure process]; *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 93, 96 [prejudice necessary to set aside sale based in defect in sale notice].) Here there was no claim that Omar did not receive notice of the sale more than 20 days prior to the sale. (See *Knapp*, at pp. 93, 96.) On appeal, Omar makes no other claim of irregularity with respect to the foreclosure sale.

DISPOSITION

The judgment is affirmed. The parties shall bear their own costs on appeal.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

OHTA, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.